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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 171

WILLARD SAXBY TOWNSEND, ET AL.,
Petitioners,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,
ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associated Justices of the Supreme Court of the United States:

Your petitioners, Willard Saxby Townsend and 1090 others who are parties plaintiffs as red cap employees, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered in the above case on March 16, 1944, affirming a judgment of the District Court of the United States within and for the Eastern Division of the Northern Judicial District of Illinois in favor of respondents and against your petitioners herein.

OPINIONS BELOW.

The oral opinion, findings of fact, and conclusions of law of the District Court of the United States for the Eastern Division of the Northern Judicial District of Illinois may be found at R. 748-751 and 755-756.

The opinion of the United States Circuit Court of Appeals is reported in 141 F. (2d) 483.

JURISDICTION.

The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stats. 938, U. S. C. A., Title 28, Section 347. The judgment of the United States Circuit Court of Appeals for the Seventh Circuit sought to be reviewed was entered March 16, 1944.

QUESTIONS PRESENTED.

The decision of the Circuit Court of Appeals for the Seventh Circuit presents the following questions:

1. Where employees of a railroad company subject to the Fair Labor Standards Act of 1938 have received tips from passengers and have been induced by the direct coercion and influence of the employer to file inaccurate reports of tips received, does the filing of such inaccurate tip reports constitute payment of wages under the Fair Labor Standards Act by the employer to the employee?

2. Under the circumstances related in the preceding question, is an agreement to account for tips, which an employer attempts to impose upon its Illinois employees, valid as payment of the statutory minimum wage required by the Fair Labor Standards Act of 1938, in view of Sections 551-553, c. 38, Illinois Revised Statutes 1943, which prohibit agreements between an employer and an employee requiring the employee to account to the employer for tips received?

3. Under the circumstances related in the first question, may a collective agreement respecting wages between a labor organization and an employer subject to the Railway Labor Act, be abrogated or replaced by individual agreements sought to be imposed by the employer over the protest of the employee or the labor organization involved without taking the steps required by the agreement or the Railway Labor Act to effectuate modification?

STATUTES INVOLVED.

The statutes involved are Sections 3 (e), (g) and (m) and 6 (a) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060; 29 U. S. C., § 201 *et seq.;* Sections 2 and 6 of the Railway Labor Act, as amended, c. 347, 44 Stat. 577, as amended June 21, 1934, c. 691, 48 Stat. 1186, 45 U. S. C., § 151 *et seq.;* Sections 551-553, c. 38, Illinois Revised Statutes 1943; Sections 1-3, Laws of Illinois 1915, p. 385.

The provisions of the Fair Labor Standards Act of 1938 primarily involved are:

SEC. 3. As used in this Act—

* * * * * *

(e) "Employee" includes any individual employed by an employer.

* * * * *

(g) "Employ" includes to suffer or permit to work.

* * * * *

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour.

The provisions of the Railway Labor Act primarily involved are:

SEC. 2. * * *

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions

of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

* * * * *

"SEC. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

The provisions of the Illinois Anti-Tipping Statute primarily involved are:

551. It shall be unlawful for the owner, proprietor, lessee, superintendent, manager or agent of any hotel, restaurant, eating house, barber shop, theatre, store building, office building, factory, railroad, street railroad, fair ground, baseball or football ground, hall used for public meetings or entertainments, or any other building, office, or space which is a place of public accommodation or public resort, to rent, lease, or permit to be used any part, space or portion thereof, for any trade, calling or occupation, or for the exercise of any privilege, by any person, company, partnership or corporation, for the purpose of accepting, demanding or receiving, directly or indirectly, from the customers,

patrons or people who frequent such places of public accommodation or public resort, gratuities or donations, commonly called tips, in addition to the regular, ordinary and published rate of charge for work performed, materials furnished or services rendered, provided, that nothing in this section contained shall be construed to prohibit any employee or servant from accepting or receiving gratuities or donations, commonly called tips, if such gratuities or donations, commonly called tips, are not accounted for, paid over, or delivered, directly or indirectly, in whole or in part, to any person, company, partnership or corporation, but are retained by such employee or servant, as and for his absolute and individual property.

552. Any lease, contract, agreement or understanding entered into in violation of the provisions of section 1, of this act shall be absolutely void.

STATEMENT OF THE FACTS AND THE MATTER INVOLVED.

This suit was instituted pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938, to recover wages for red caps from October 24, 1938, the effective date of the Act, up to the time in 1940 when the respondents here[1] placed red caps on their payrolls. The District Court entered judgment for the respondents which was affirmed by the Circuit Court of Appeals.

Background of the Red Cap Craft.

Commencing in 1895 with the New York Central, American railroads began to employ uniformed attendants known as "red caps" to perform a myriad of duties in their larger terminals. For many years, all the respondents here have employed red caps principally to carry passengers' hand baggage and other articles from the entrances of their larger stations to outgoing trains and from incoming trains to the station exits. Red caps generally unload Pullman cars on the incoming trains, and taxicabs at the station entrances. Although for certain

1. The defendants to this action are The New York Central Railroad Company, hereinafter referred to as the New York Central; The Pennsylvania Railroad Company, hereinafter referred to as the Pennsylvania; Illinois Central Railroad Company, hereinafter referred to as the Illinois Central; Chicago and Western Indiana Railroad Company, hereinafter referred to as the Chicago and Western Indiana; Charles M. Thomson, trustee of the property of Chicago and North Western Railway Company, hereinafter referred to as the North Western; Frank O. Lowden, James E. Gorman and Joseph B. Fleming, trustees of the estate of the Chicago, Rock Island and Pacific Railway Company, hereinafter referred to as the Rock Island; Henry A. Scandrett, Walter J. Cummings and George I. Haight, trustees of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, hereinafter referred to as the Milwaukee Road, and the Atchison, Topeka and Santa Fe Railway Company, hereinafter referred to as the Santa Fe.

purposes respondents used to contend that red caps were mere licensees or concessionaires, they nevertheless exercised complete authority over the manner and conduct of the red caps' work and their hire and discharge.

Wages paid to red caps have had a varied history. At first, the railroads paid wages. Then they began to employ some men without paying wages. During the economic depression beginning in 1929, many railroads ceased paying wages, while others, particularly railroads in the western portion of the United States, continued paying wages throughout the entire period of this action. (R. 73-74.) Before October 24, 1938, respondents paid wages to some red caps and not to others. Although not all passengers tipped, all red caps did receive tips from passengers. The railroads forbade them either to discriminate among passengers or to solicit tips and required them to bear a courteous manner in accepting whatever was offered. The railroads took the position that they were not obligated to and did not pay red caps wages for transporting hand baggage. (R. 589, 778, 793, 809, 827.)

Advent of the Fair Labor Standards Act.

On the enactment date of the Act, June 24, 1938, respondents were first required by law, effective four months later on October 24, 1938, to pay wages of at least twenty-five cents per hour to all employees including red caps. A committee appointed by the Association of American Railroads (R. 552) to consider the question of wages for red caps devised a form of notice (R. 394-398) which was delivered to the red caps employed by the respondents on or about October 24, 1938, reading as follows:

> In view of the requirements of the Fair Labor Standards Act, effective October 24, 1938, and in consideration of your hereafter engaging in the handling of hand baggage and traveling effects of passengers or

otherwise assisting them at or about stations or destinations, it will be necessary that you report daily to the undersigned the amounts received by you as tips or remuneration for such services.

The carrier hereby guarantees to each person continuing such service after October 24, 1938, compensation which, together with and including the sums of money received as above provided, will not be less than the minimum wage provided by law.

You are privileged to retain subject to their being credited on such guarantee all such tips or remuneration received by you except such portion thereof as may be required of you by the undersigned for taxes of any character imposed upon you by law and collectible by the undersigned.

All the matters above referred to are subject to the right of the carrier to determine from time to time the number and identity of persons to be permitted to engage in said work and the hours to be devoted thereto, to establish rules and regulations relating to the manner, method and place of rendition of such service, and the accounting required. (R. 773.)

This notice came to the red caps as a complete surprise, and petitioners, acting through their labor organization, the International Brotherhood of Red Caps, sent an immediate written protest to all the defendants except the Milwaukee Road, reading in part as follows:

> * * * if, as you apparently contend red caps are covered by the Fair Labor Standards Act, then you must pay them an average minimum hourly wage of 25¢ and you may not apply tips against this amount. This you have so far failed to do. Furthermore certain carriers are threatening to discharge red caps who do not receipt for notices and, under threat of discharge we have advised red caps for the time being to receipt for such notices. We hereby notify you that such receipts are signed by red caps under protest and without waiving any rights vouchsafed to them by statute. (R. 778.)

Plaintiffs and others also protested the respondents' plan to the Administrator under the Act, as more fully described in the Report of Philip B. Fleming, Administrator under the Fair Labor Standards Act, on Senate Resolution 325, 76th Congress, 3rd Session, filed with the United States Senate, November 30, 1940.

Operation of Respondents' Notice and Plan in Practice.

After October 24, 1938, on forms furnished by respondents, petitioners filed their own reports of hours worked in addition to the time records kept by the respondents and they also filled in figures after the items labeled "amount of tips." (R. 776.) At first, petitioners accurately wrote amounts which were in many cases less than twenty-five cents per hour. In many ways, respondents promptly made it clear to plaintiffs that the petitioners must file reports equaling at least twenty-five cents per hour as a condition of continued employment, even though the money was not actually received. The record contains numerous instances of such conduct by respondents, including direct oral and written instructions to inflate tip reports, threats of discharge for failure to follow orders, and actual discharges and lay-offs following the filing of correct tip reports.

The average monthly wages actually paid in so-called deficiency checks by each respondent were as follows:

Respondent	Average Monthly Amount Paid to Each Red Cap
Chicago & Western Indiana.....	$0.18
Illinois Central	0.94
Milwaukee Road	0.65
New York Central	2.73
North Western	2.28
Pennsylvania	1.05
Rock Island	0.017
Santa Fe	0.01

Coercion and Undue Influence.

The coercive pressure was overt, direct, and unambiguous. The record discloses the following direct coercion by the respondents:

A supervisor in charge of red caps for the Illinois Central told Horace Hale, captain of the red caps: "Show $2 and tell the other men to show it also." (R. 118.) Horace Hale notified the other men. (R. 118.) One station master for the Illinois Central told Felix Braxton that the superintendent said, "he ain't going to pay you and he would cut out all the red caps first." (R. 131.) The station master added: "If I have to pay any of you a check, that is the man that is off." (R. 131-132.) Braxton summarized the situation: "If you don't have that amount there and they pay you the check, the cap is theirs and the check is yours. So that is the reason we signed up for $1.50 and we know we don't make it." (R. 135.)

A supervisor of red caps for the Illinois Central told Arthur Moon: "You are supposed to sign $2 on the slip right away or you will not have a job." Moon reported $2.00 and later $2.40 for eight hours of work, although he did not receive that much in tips. (R. 142, 143.) In New Orleans the ticket agent told Emanuel Keiffer that if he didn't "do better", he would cut his job off, and instructed him to "tell the other boys." (R. 145.) Another supervisory official called in the red caps and told them to "come up on" their slips. (R. 145.)

In Chicago, when the plan went into operation, the Illinois Central posted a sample report slip on the bulletin board with the sum of $2 as the amount of tips filled in in red crayon. Most of the red caps there worked eight hours. (R. 150, 151, 176.) The Chicago and Western Indiana station master instructed James F. Nichols to put down twenty-five cents for every hour he worked. Nichols

asked, "What if we don't make that much?" The station master answered, "You are supposed to put down the 25 cents per hour." (R. 210.) That was in October, 1938. A month later the station master called him in to ask him to raise a report he had made. Nichols had truthfully reported 90 cents received after seven hours of work. The station master instructed him to write down $1.75 and erased the earlier notation. (R. 210-211.)

In the Grand Central Terminal in New York City, the New York Central brought up on charges sixteen men who had failed to report twenty-five cents an hour and had received deficiency checks. The railroad reprimanded them. (R. 249-255.) The station master announced that if the men could not "make that amount of money why, it showed there were too many men on the job and he would have to furlough the men until such time as the men could bring up the amount and could make it." (R. 272.) Approximately forty-five red caps were discharged at about the same time. (R. 273.) All these matters were naturally reported to the other red caps. At the same terminal, if a red cap reported less than twenty-five cents an hour, the railroad called him for a reprimand (R. 287); but not if his report exceeded twenty-five cents an hour. In fact, the railroad devised a system of slips. If a red cap reported less than twenty-five cents an hour, either he would be instructed to see the station master or he would receive a rubber stamped paper entitled "Short Slip For * * * (date)". One such slip introduced in evidence bore the timekeeper's notation "Show $2.00." (Plaintiff's Exhibit 13, R. 279-280.)

In Detroit, red caps reported tips received, and, as a result, over a year's time the New York Central paid them some thousands of dollars in checks. The actual payroll at the station was apparently not in harmony with the railroad's original plan to avoid paying wages. As a pre-

cautionary move, seven men were discharged, allegedly for "falsifying their reports." (R. 301, 446.) On October 31, 1939, the situation at the Detroit station was discussed at a meeting between the red caps and the vice-president of the railroad. The vice-president announced that the payroll at the Detroit station was proving embarrassing to him and that if only the red caps would write out reports of $2.40 for eight hours worked, he would reinstate the seven red caps and refrain from further lay-offs. That was done. (R. 296-297.) The words of the vice-president were reported to all the red caps and the reports were made, even though equivalent tips were not received. (R. 296-297, 548-549.)

In Pittsburgh, the Pennsylvania announced that it would furlough red caps if sufficiently high reports were not received and, fearing dismissals, the red caps filed reports adjusted to twenty-five and thirty cents an hour even though these amounts were not received. (R. 315.) Before October 24, 1938, the railroad had not discussed furloughing red caps. The station master in Pittsburgh asked Ira Valentine and Elmer Traynham to use their influence to persuade the other red caps to bring up the amounts on their slips. (R. 315, 328.)

In Baltimore, the Pennsylvania station master called in Stephen Wright and John Anthony a few days after October 24, 1938 and told them that their reports were less than 25 cents an hour. After Wright answered that he was reporting the exact amounts of tips received, the station master said: "You two birds will have to bring your reports up. If you don't, you will not report for work Monday morning. You won't work around here any more." (R. 331.)

When October 24, 1939 came, the minimum wage increased from twenty-five to thirty cents an hour. At that time, a superintendent of red caps for the Illinois Cen-

tral told Ernest Robinson: "Robinson, put down $2.40 down there. The rest of the boys are doing it." (R. 98.) Robinson told the other red caps of his conversation. (R. 98.) As Robinson testified on cross-examination: "I got a written notice. That was in October, '39 to make out an accurate account. The oral notice was to make out the minimum amounts." (R. 114.) At about the same time, on October 27, 1939, the superintendent told Horace Hale "to show at least $2.40" for eight hours worked and to tell the other men to do the same. (R. 119.) Shortly before, an Illinois Central station master told Felix Braxton: "Now I am going to give you all two days to go up on (your slips) there and they that don't, why, I will cut them off." (R. 133.) Shortly thereafter four men were laid off. (R. 133.) At about the same time, the station master for the Chicago and Western Indiana called in R. E. Stephens and said: "What do you mean by putting 75¢ on your time card?" Stephens answered: "75¢ is all I made last night." The rejoinder was, "Well, you are supposed to put $2.40 on this card regardless of what you make." (R. 230.) So Stephens followed instructions and marked his card to $2.40. Another station master for the same railroad told Stephens: "Yesterday you worked eleven hours and you marked your card $2.40. It should be $3.30." (R. 231.) Stephens followed instructions and changed his card. In Baltimore, the Pennsylvania station master called in Stephen Wright about a month before October 24, 1939, and said to him: "Wright, I have my orders, you have yours, and I want you to go out and tell the men to bring their slips up gradually so that when they get to 30 cents an hour they won't make a sudden jump," and added: "Don't tell the men I said so." (R. 332.) Wright informed the other red caps. The attitude of the railroads seems to be best summarized by the statement of the same Baltimore station master: "The Pennsylvania don't intend to pay you a damn cent." (R. 330.)

The effects of the respondents' acts were described as follows: Petitioner Horace Hale said, "I was interested in conforming and complying with the officials of the railroad, otherwise I would not have left that other system of turning in what I had made." (R. 125.) Felix Braxton said, "We put it down anyway because we didn't want to lose our jobs." (R. 131-132.) Ernest Robinson testified that he did it because "I wanted to work, * * * I knew of boys that had been let out and I had been told to put it on there and so I put in on there. * * * I heard men were laid off for not filing the required amount." (R. 101, 110.) Morris Socks said that he reported more than he received because he didn't want to get into any difficulty, "perhaps be called up to the office about it or *may be* suspended or something." (R. 177.) Eugene Shepard said that he put down the amounts even though not received because "it would save a lot of time and trouble". When asked to explain what he meant by trouble he answered, "When you are on a job and the boss don't exactly come out and tell you, but by inference and suggestion he tells you, why, it is just a way we have of going ahead and doing the right thing, what we figure the company wants us to do." (R. 188-189.)

At the Grand Central Terminal in New York City, forty-five men were furloughed. They were men with families. Some had insufficient clothes. Others had insufficient food. Two hundred of the working red caps combined and assessed themselves ten cents a day to keep the discharged men from being put in the street and to keep their families from starving. They decided that if the New York Central was going to dismiss men because the red caps were reporting only the actual amount of tips received, they would call a halt to discharges by reporting the twenty-five cents an hour. (R. 261.)

Respondents knew that the tip reports were inaccurate.

The personnel director of the Illinois Central Railroad admitted that he believed as early as November 1938 that the reports were inaccurate. (R. 393.) A Pennsylvania station master said that he never believed the tip reports to be accurate. (R. 406.) An Illinois Central superintendent said he had felt since the end of October 1938 that the tip reports were inaccurate (R. 426); and the New Orleans station master said he too believed the tip reports were inaccurate. (R. 443.) The Chicago and Western Indiana superintendent said he always felt that the tip reports were inaccurate. (R. 466.)

At the Illinois Central Station in Chicago reports for the day were usually received at the beginning or the middle of the day. (R. 151-152.) In Pittsburgh, reports for the entire day were received at the beginning of the day or at any time when it was convenient for the red cap. (R. 316.) This was done also at the Chicago and Western Indiana Station. (R. 232.) There, too, five men worked six months without the respondent's ever asking them to make out tip reports or telling them in any way about the accounting and guarantee notice. (R. 223-224, 229-230, 232-233.) For these men there never were any reports at all during the entire six months' period. The attorneys for two of the respondents admitted to the Court that the reports upon which they relied were inaccurate. (R. 203, 205-206.)

SPECIFICATION OF ERRORS TO BE URGED.

The Court below erred:

1. In holding that the coercion or influence exerted by the employers upon the red caps to induce them to file inaccurate reports of tips received was immaterial.

2. In holding that the filing by red caps of inaccurate reports of tips received, induced by the coercion and influence of the employers, constituted proof of payment of wages by the employers to the red cap employees.

3. In holding that under the Illinois statute rendering void any agreement between employee and employer to account for tips, the agreement relied upon by the respondents in this case was valid as to Illinois employees.

4. In holding that under the Illinois statute rendering void any agreement between employee and employer to account for tips, and under the Fair Labor Standards Act unequivocally requiring the payment of wages, the employee and the employer, under an agreement rendered void by Illinois law, would be *in pari delicto* and the Illinois employee could not recover unpaid wages from the employer.

5. In failing to hold that where the employees and the employer have entered into a collective agreement governing working conditions and payment of wages, the employer may not unilaterally and individually, over the objection of the employee or contracting labor organization and without complying with the Railway Labor Act or the agreement, change the amount of wages and the wage payments; and in failing to hold that any individual arrangement so attempted by a railroad employer under the Railway Labor Act would be void.

REASONS FOR GRANTING THE WRIT.

I. Petitioners submit that this Court should issue its writ of certiorari, because the Circuit Court of Appeals for the Seventh Circuit has decided important questions of Federal law which have not been, but should be, settled by this Court, and has misinterpreted and misconstrued the decision of this Court in the case of *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386, these questions being heretofore set forth at page 3 of this petition. Said Court also decided an important question governing the relationship between Federal law and State law which has not been, but should be, settled by this Court. The determination of these questions involves the construction of two important Federal statutes—the Fair Labor Standards Act of 1938 and the Railway Labor Act, of one important State statute—the Illinois Anti-Tipping statute, and of the opinion of this Court in *Williams* v. *Jacksonville Terminal Co.*

The determination of these questions by this Court is of great public importance in order to give effect to the purpose and provisions of the Fair Labor Standards Act of 1938 and to prevent the misuse and misconstruction of the previous opinion of this Court in the case of *Williams* v. *Jacksonville Terminal Co.* The decision of the Circuit Court of Appeals in this case, if permitted to stand, will have a far-reaching effect for it will approve a method which may be adopted to evade the plain terms of the statute, not only by railroads but by any employer in tipping occupations, and which would effectively prevent any substantial group of employees from obtaining relief in the event of employer coercion or influence in compelling the inaccurate reporting of tips.

In the annexed brief, petitioners have set forth reasons why they believe that the Circuit Court of Appeals erred in its decision, and they will not here reiterate their criticism of the decision except to point out that the Court's unusual holding, to-wit, that the employer's coercion in inducing the employee's inaccurate reporting of tips is immaterial, is so startling as to call for the exercise by this Court of its discretionary power to review.

II. Petitioners submit that this Court should issue its writ of certiorari herein for the further reason that another important question of Federal law was erroneously decided by the Circuit Court of Appeals; that is, whether a collective agreement between a labor organization and an employer under the Railway Labor Act, providing for working conditions and payment of wages, may be abrogated or replaced by individual agreements providing for different amounts and methods of wage payments over the objection of the employees or the labor organization.

This error made by the Circuit Court of Appeals is of great public importance because it indicates a method by which the stability of collective agreements confirmed by this Court may be seriously affected by the unilateral action of an employer. Petitioners respectfully submit that this Court should settle this question concerning the stability of the collective agreement so that both employer and employees subject thereto may definitely know their rights and obligations thereunder.

III. Petitioners submit that this Court should issue its writ of certiorari for the further reason that an important question of State law and of the relationship between Federal and State laws, which has not been, but should be, settled by this Court, was decided by the Circuit Court of Appeals; that is, whether, under

the Fair Labor Standards Act, where payments claimed to have been made by the employer are based solely upon an agreement imposed by the employer which is against the statutory public policy of the State and void under State law, the Court will refuse to enforce the Fair Labor Standards Act on the ground that the parties are *in pari delicto*.

Petitioners respectfully submit that this Court should settle this serious question involving the relationship between Federal and State laws so that the intent of the Fair Labor Standards Act and the enactment of Congress in that field may not be defeated.

For these reasons, petitioners submit that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

LEON M. DESPRES,
M. J. MYER,
Attorneys for Petitioners.

June 16, 1944.

SUMMARY OF ARGUMENT.

I.

Under the Fair Labor Standards Act, where the employer has issued an accounting and guaranty plan requesting the red cap employee to report tips received against the employer's ostensible agreement to pay the difference between tips reported and the minimum statutory wage, and the employer, by coercion and influence, directs the red cap employee to file inaccurate reports of tips received so that there is no difference between the inaccurate report filed and the minimum statutory wage, there is no payment of wages. The facts of coercion and influence vitiate the entire arrangement imposed by the employer, and the employer may not rely upon it as the equivalent of the payment of statutory minimum wages. The issues in this case are entirely different from the issues in *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386.

II.

Under the Illinois statute regulating tipping and providing that any agreement or understanding requiring an accounting for tips as therein provided should be void, respondents may not rely for payment of the statutory minimum wage to the Illinois petitioners upon an agreement expressly declared by the Illinois statute to be void.

III.

In view of the existence of negotiated agreements respecting wages, respondents Illinois Central and North Western may not, by the unilateral individual service of notices upon the individual employees over the objections

of the employees or their labor organization, impose a new wage arrangement without following the procedure for modification prescribed by the Railway Labor Act. Respondents may not rely upon such attempted individual modifications as an arrangement for the payment of the statutory minimum wages required by the Fair Labor Standards Act.

ARGUMENT.

I.

(Coercion and Undue Influence.)

The Circuit Court of Appeals erroneously stated "that it would be immaterial whether the reporting of tips in excess of the amount received was the result of coercion, mistake or otherwise." (141 F. (2d) 483, 485.) During the period covered by this action, respondents admittedly failed to pay petitioners in cash any wages required by the Fair Labor Standards Act excepting the amounts tabulated above at page 10. Therefore, respondents rely entirely upon the tip *reports* filed by petitioners for the performance of their statutory obligation to pay wages. We submit that the facts evidencing coercion shown above at pages 11-16 deprive respondents of the right to rely upon such reports for the performance of their obligations. The law does not permit anyone to benefit by his own wrong. Most particularly when a statute imposes a solemn duty for the protection of a weaker party, the stronger party may not benefit by any admissions obtained through his own coercive power. The very purpose of the statute is to protect the weaker party, here the employee, and to impose upon the stronger party, here the employer, an unequivocal obligation to pay wages.

The Circuit Court of Appeals is in serious error when it suggests that proof of coercion is immaterial.

The District Court and the Circuit Court relied on the fact that only nineteen petitioners testified as to the existence of a scheme of coercion, while 1072 petitioners did not testify. It is apparent from the memorandum opinion of

the District Court (R. 749) that this arithmetical formula was heavily relied on for that Court's conclusion that its decision was foreclosed by the Supreme Court's decision in *Williams* v. *Jacksonville Terminal Company*. However, the nineteen petitioners who did testify, testified as to the generally applicable conditions attending the inauguration and operation of the entire arrangement, and their testimony vitiates the arrangement as to all redcaps involved, not merely as to themselves. The Circuit Court of Appeals was in error when it said:

> "All of the plaintiffs having failed to offer proof in this respect, it follows that none of them were (sic) entitled to judgment." (141 F. (2d) 483, 485.)

The Court was correct, however, in stating that of the nineteen witnesses who testified as to the coercion by the respondents, their testimony directly affected the general vitiation of the plan only by the principal respondents, New York Central, Pennsylvania, Illinois Central, and Chicago and Western Indiana and the 966 petitioners employed by them. It is true that no specific testimony of coercion was offered as to the respondents the Milwaukee Road, the North Western, the Rock Island, and the Santa Fe, involving 125 petitioners. But the Court made no distinction among respondents. We submit that the lower courts in effect found for the respondents solely on the basis that the decision of the Supreme Court in *Williams* v. *Jacksonville Terminal Company* had resolved the issues and without regard to the testimony. Petitioners believe that the testimony of coercion demonstrated the inherent unsoundness everywhere of the respondents' arrangement which, if effective, permits respondents directly to profit by their own wrong.

The facts of this case are basically different from *Williams* v. *Jacksonville Terminal Company*. No showing of coercion or influence was made there. In that case the

transcript of record, at page 47, includes a stipulation by the parties that in each instance the tip report "correctly shows * * * the amount received by each of the plaintiffs from passengers." In the companion case of *Pickett* v. *Union Terminal Company*, the transcript of record, at page 124, includes a stipulation by the parties "that said Red Caps collected tips from persons using defendant's station equal to or greater than the amounts set out under the column headed 'Balance Due.'" In its opinion, the Court there pointedly said, in sharp contrast to petitioners' stated and proved position here:

> "The petitioners do not dispute the railroad's contention that, during the entire period, each redcap received as earnings—cash pay plus tips—a sum equal to the required minimum wage." (p. 388)

In this case there is no stipulation and there is no proof that petitioners received the minimum wage. The proof shows that, as to the four principal respondents, New York Central, Pennsylvania, Illinois Central, and Chicago and Western Indiana, involving 966 of the 1091 petitioners, the tip reports upon which the respondents rely were exaggerated as the direct result of respondents' own acts of coercion, and respondents failed to prove any payment of the statutory wage admittedly due to petitioners. We submit that the Circuit Court of Appeals was in error when it said that since the Williams decision "there is little left for discussion or decision in the instant case." (141 F. (2d) 483, 484.)

The court below relied on decisions holding that the burden of proof is on an employee to show that he did not receive wages to which he was entitled under the Fair Labor Standards Act. The cases cited by the Circuit Court of Appeals involve ordinary factual situations where an employee is required to show the work done, the hours worked, and the nonpayment of wages. Here, however, the

petitioners have shown the work done and the hours worked, and the respondents have admitted their failure to pay wages except as set forth in the tabulation above at page 10. As a substitute for performance of their statutory duty, respondents affirmatively presented to the Court the arrangement upon which respondents here rely. Petitioners then showed that as to 966 petitioners the arrangement was clearly vitiated because of acts of coercion and undue influence which were parts of a pattern running through the entire accounting and guaranty plan as applied, thus overcoming respondents' offer, and respondents may not now rely on any such arrangement. The record must therefore stand upon the only actual payments of wages alleged by respondents, namely, those tabulated above at page 10.

In *Williams* v. *Jacksonville Terminal Company*, no evidence whatsoever was introduced in addition to the above described stipulations to show the operation of the notice, the acts of the employers, or the effects on the redcaps. The Court had before it only the wording of the notice and the stipulations of the parties. There was no evidence, such as the Court has before it here, showing coercion by the employers which would vitiate the arrangement upon which respondents rely.

In the Williams case this Court suggested that

> "If the redcap did not accept the terms offered he would be a volunteer and not an employee. As a volunteer he could probably keep his tips, but would not be entitled to a contractual wage."

In this case the redcaps actually did not accept the terms offered. As to all of the respondents, except the Milwaukee Road, petitioners refused absolutely to accept the terms offered by respondents. (See R. 778.) Petitioners were then entitled to keep their tips. But they were entitled to the statutory wage which respondents were obliged to pay,

because, although possibly volunteers, they were persons whom respondents continued to suffer and permit to work. Therefore, under Sections 3 (a) and (g) of the Fair Labor Standards Act, which define an employee as an individual whom an employer may "suffer or permit to work," respondents were liable to petitioners for the full statutory minimum wage and, concurrently, respondents' arrangement was vitiated by respondents' own coercive actions. By rejecting respondents' notice and refusing to assent to its terms, petitioners did not cease being statutory employees and they were entitled to rely upon the mandatory statutory wage payable to each employee. Nor can it be said that petitioners would thereby receive an "earnings-preference" over any other employee. Petitioners protested the notice for inherent illegality; they protested the notice for the coercion exercised by the respondents; they did not, in fact, receive the amounts of tips which they were required to report as a preventive against discharge; and they requested payment of the wage required by statute. Respondents, fully aware of the implications, remained intransigeant. The entire responsibility rests upon respondents, who apparently became better advised in 1940 and actually did commence paying wages to redcap employees.

The employees' right to be paid the minimum wage is a right which cannot be waived by the employee or satisfied by any subterfuge. As the Supreme Court of Arizona stated in *City of Glendale* v. *Coquat*, 52 P. (2d) 1178 (Ariz., 1935), in which an employer argued that the plaintiff employee, having accepted lesser amounts and delivered his receipts in full, was estopped from claiming the statutory minimum wage:

> "We are of the opinion that the acts of plaintiff, as they appear from the record in this case, could, under no circumstances, be characterized as creating

> an estoppel, but they might and very probably would be considered as a waiver of his right to the extra compensation, were it not for one thing. As we have stated in several cases, the minimum wage law is not only meant for the establishment of individual private rights, but is a solemn declaration on the part of the state that, as a matter of public policy, it is interested in seeing that its citizens are protected in such rights. (Citations.) It is apparently universally held that where a right has been given an individual not alone for his private benefit but, as a matter of public policy, in the interest of the state, it may not be waived by any one." (p. 1180.)

See also *Larsen* v. *Rice*, 100 Wash. 642, 171 Pac. 1037.

A device to evade a basic statutory prohibition will be disapproved, regardless of any formal reports of innocence signed by the parties. Courts will look beyond the mere form of a transaction to its substance. See *Warner* v. *Foshay*, 57 F. (2d) 656 (C. C. A. 8th).

We submit that the proof of coercion and influence (and consequent non-payment of the statutory wage) sharply distinguishes this case from the facts before the Court in *Williams* v. *Jacksonville Terminal Company*. Petitioners made their positions to respondents unequivocally clear, and respondents nevertheless persisted for more than eighteen months in supporting a vicious arrangement. Under penalty of discharge (and in the years 1938 and 1939 the threat of discharge, especially as to Negro employees, was equivalent to a threat of enforced poverty) the employees continued to work under protest and respondents continued to "suffer or permit" them to work with full awareness of their obligations as employers under the Act and of the vitiated nature of their arrangement for the supposed payment of wages.

This issue is by no means dead. It involves a basic interpretation of the Fair Labor Standards Act, not under

the facts of *Williams* v. *Jacksonville Terminal Company* but under the facts presented in this case involving extensive coercion by the respondents.

II.

(Illinois Anti-Tipping Statute.)

Under the Illinois statute regulating tipping, Sections 551-553, c. 38, Illinois Revised Statutes 1943, the accounting arrangement relied upon by respondents was absolutely void in that state. Therefore, as to petitioners who worked there, the arrangement is void by State statute and the accounting claimed by respondents under the void agreements must be disallowed. In the Supreme Court decision in *Williams* v. *Jacksonville Terminal Company*, the Court contemplated that there might be other statutory objections to the accounting arrangement there relied upon by the railroads, and expressly conditioned its approval of the railroads' notice upon the "absence of statutory interference." (p. 397.) In Florida and Texas there was no statutory interference, or at least none was brought to the attention of the court. In Illinois, however, the State statute, set forth above at pages 5-6, does make such an agreement void.

The Circuit Court of Appeals discussed the statutes, but relied upon an Illinois Appellate Court decision, *Gloyd* v. *Hotel La Salle Co.*, 221 Ill. App. 104, the only State decision discussing the Illinois anti-tipping statute. In that case check room tips had been received by an employee and turned over daily *in specie* to the employer. In a suit by the employee to recover all the tips which had been turned over during a period of 23 months, the Illinois court denied recovery, on the theory that the parties were *in pari delicto* since they were both parties to an illegal agree-

ment. The Illinois court would neither enforce the illegal agreement nor award to the employee the moneys actually paid to the employer under it. The Court also relied on the absence of coercion by the employer. (p. 108.)

We submit that the Circuit Court of Appeals entirely misapplied the Illinois decision. Following the rationale of that decision, the Circuit Court of Appeals should have said in this case: since the accounting arrangement was void under Illinois law, the Court would leave all transactions under it as though they had not taken place, would permit neither party to take advantage of or benefit by the accounting arrangement, and would enforce the statutory obligation under the Fair Labor Standards Act without regard to the void arrangement.

By its holding, the Circuit Court of Appeals did not follow the ruling of the Illinois court; it allowed the respondents to benefit by a void accounting agreement and to offer as credits for wage payments moneys never received by petitioners, but merely claimed by respondents under the void agreement. Therefore, the Circuit Court of Appeals went directly in the face of the Illinois decision, and, far from treating the parties *in pari delicto*, it enforced the agreement as valid and effective for respondents, the very persons as to whom the statute makes the agreement void.

Moreover, even if the Circuit Court of Appeals were correct in its interpretation of the Illinois decision, we doubt that the *pari delicto* theory would apply to the case of a minimum wage statute, such as the Fair Labor Standards Act, as to which the usual doctrines of waiver, estoppel, and receipt are inapplicable. If the employer did not pay the employee, this Court should not withhold recovery because the employee is *in pari delicto*. The Fair Labor Standards Act of 1938 is intended to aid particularly these

employees whose bargaining power is too weak to prevent overreaching by the employer.

The Circuit Court of Appeals, in order to overcome the clear effect of the Illinois statute, stated that the tips given to red caps were not "in addition to the regular, ordinary and public rate of charge for work performed, materials furnished or services rendered." Again we submit that the Circuit Court of Appeals entirely misconstrued the statute. The Illinois statute applies not specifically to the red cap employees, but to places of public accommodation and resort, including any "railroad". It prohibits the *railroad* from entering into any agreement or understanding under which tips are to be accounted for when they are received from patrons in the railroad's place of public accommodation "in addition to the regular, ordinary and published rate of charge for work performed, materials furnished or services rendered." It is clear beyond a doubt that the railroads operate according to regular tariffs and make regular charges for the work which they do and the services which they perform. By referring to "any hotel, restaurant, eating house, barber shop, theatre, store building, office building, factory, railroad, street railroad, fair ground, baseball or football ground, hall" and other places of public accommodation or resort, the statute, it is clear, was expressly designed to cover the multitudinous services, such as check rooms in restaurants, wash rooms in hotels, and, yes, redcapping in railroad stations, precisely in order to prevent the concessionairing of such services and the deceptive diversion of tips from employees for whom the giver intended them to employers for whom the giver did not intend them, for services "in addition to the regular, ordinary and published rate of charge for work performed, materials furnished, or services rendered" in such places. A reading of the entire statute leaves no doubt as to the intention of the Illinois legislature. This clear provision, of which

respondents were at all times aware, specifically provides that any agreement or understanding entered into in violation of its provisions shall be absolutely void.

We believe that the Circuit Court of Appeals entirely misconceived not only the purpose of the statute, but the meaning of the Supreme Court. To buttress its decision, the Circuit Court of Appeals cited the Supreme Court's dictum in *Williams* v. *Jacksonville Terminal Co.*, with reference to a violation of the Interstate Commerce Act. In addition to its general public character, the Interstate Commerce Act was passed for the benefit of the passenger. The Supreme Court therefore held that a contention that the Interstate Commerce Act has been violated would not "avail petitioners," who are employees. The Illinois Anti-Tipping statute, however, was passed for the benefit of the public and the employee. Certainly the employees themselves, for whose benefit the Act was passed, are entitled to and should be permitted to invoke the protection of the statute. We believe that the Circuit Court of Appeals seriously misconstrued this Court's opinion.

III.

(Effect of Negotiated Collective Agreements.)

The Circuit Court of Appeals failed even to discuss the effect of the existence of negotiated agreements respecting wages. The respondents North Western and Illinois Central (Chicago only), and the petitioners employed by them, were governed as to wages by collective bargaining agreements (R. 788, 813), and the accounting and guaranty notice served by those respondents was invalid and ineffectual. In *Williams* v. *Jacksonville Terminal Co.*, the Supreme Court upheld the unilateral accounting notice only "in the absence of a negotiated agreement respecting wages." (p. 388.) In the Williams case and in its companion case no collective agreements covering wages had been

entered into at the time the notices were served, and the Supreme Court therefore held that the employers' notices were not barred by collective agreement. In this case, however, the two named respondents had entered into signed collective agreements covering wages but nevertheless failed to take any steps, as required by the Railway Labor Act or the agreements themselves, to effectuate modifications. In order to change a negotiated agreement, the Railway Labor Act requires the carrier to give thirty days' written notice, to agree upon a time for conference, to confer with the labor organization, and to give the Mediation Board ten days' time to proffer its services. (45 U. S. C., Sec. 156.) The statute provides that until the controversy has been finally acted upon by the Board "rates of pay, rules and working conditions shall not be altered by the carrier."

In the recent decision in *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, this Court held that an employer operating under the terms of a collective agreement could not enter into individual agreements covering conditions already governed by the collective agreement. As the Court stated:

> "We hold that the failure of the carrier to proceed as provided by the Railway Labor Act of 1926 then applicable left the collective agreement in force throughout the period, and that the carrier's efforts to modify its terms through individual agreements are not effective." (p. 347.)

The same doctrine was affirmed in another decision of the Supreme Court rendered on the same day in *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332. Although these decisions and the statutory provisions were specifically called to the attention of the Circuit Court of Appeals and seem clearly to prevent respondents' use of its arrangement as to all employees covered by these collective agreements, that Court did not trouble to discuss the questions raised.

CONCLUSION.

We submit, therefore, that the judgment of the Circuit Court of Appeals ought to be reversed as follows:

1. As to all the respondents and all the 1091 petitioners, on the ground that experience and public records now demonstrate the so-called accounting and guaranty plan to be wholly vitiated, so that respondents should not be entitled to rely upon it as a substitute for the payment of wages.

2. As to the four respondents (New York Central, Pennsylvania, Illinois Central, and Chicago and Western Indiana) and the 966 petitioners as to whom specific factual evidence was introduced covering the coercion and influence applied them to their employees, for the reason that the evidence demonstrated that these respondents are attempting to take advantage of their own wrong and should therefore not be permitted to rely upon the arrangement proffered by them in defense of petitioners' claims.

3. As to the 195 petitioners employed in Illinois, on the ground that the Illinois Anti-Tipping Statute renders the respondents' accounting arrangements entirely void.

4. As to the 143 petitioners whose wages were covered by the terms of collective agreements, for the reason that the employers, over the employees' protests, attempted to substitute individual agreements for the collective agreements, without taking the steps required by contract or by law.

Petitioners therefore pray that this Court issue its writ of certiorari so that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit may be reversed and judgment entered for petitioners.

Respectfully submitted,

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Attorneys for Petitioners.

June 16, 1944.

JUL 31 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 171

WILLARD SAXBY TOWNSEND, ET AL.,
Petitioners,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,
ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION.

Opinions Below.

The memorandum opinion of the District Court of the United States, Northern District of Illinois, Eastern Division, has not been reported; but it is set out in the record, together with the findings of fact, conclusions of law, and judgment (R. 748-751 and 755-756).

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 141 F. 2d 483.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered March 16, 1944. The petition for a writ of certiorari was filed June 16, 1944. The jurisdiction of the Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, sec. 1, 43 Stat. 938; U. S. Code, title 28, sec. 347).

Petitioners have failed, in several respects, to comply with the rules of this Court (Rule 38, pars. 2 and 3):

1. Notice of the filing of the petition was not received by counsel for respondents until the eleventh day after the filing.

2. The printed record was not served upon counsel for respondents within ten days after the filing of the petition. It was not received by them until July 22, 1944.

3. Respondents respectfully suggest that the petition does not contain "a summary and short statement of the matter involved," and that the supporting brief is not "direct and concise."

Questions Presented.

1. Whether the trial court's finding of fact, at the conclusion of the trial without a jury, to the effect that—

> "Each of the plaintiffs has failed to prove by a preponderance of the evidence that his respective employer-defendant failed to pay him the minimum wages prescribed by Section 6 of the Fair Labor Standards Act of 1938 * * * for any pay-period during the time covered by this action,"

which finding of fact the Circuit Court of Appeals in its

opinion and by its judgment of affirmance held to be clearly supported by the evidence, should be further reviewed by this Court.

2. Whether this Court will review the judgment of the Circuit Court of Appeals to the effect that, under the Illinois decisions construing the Illinois anti-tipping statute (June 29, 1915, Illinois Laws, 1915, p. 385; Ill. Rev. Stat. 1943, c. 38, pars. 551-553), petitioners cannot recover tips accounted for to their respective employer-respondents under an accounting and guarantee plan, established at the effective date of Fair Labor Standards Act of 1938, which left all tips with petitioners and assured them that each would receive at least the minimum wages.

3. Whether this Court will review the judgment of the Circuit Court of Appeals merely because its opinion did not discuss a point with respect to the alleged invalidity, under the Railway Labor Act, of the accounting and guarantee plan as applied to the employees of only two of the eight respondents, when the point was not argued during the oral argument before the Circuit Court of Appeals, petitioners filed no petition with that court for a rehearing, and the record supports the trial court's finding that the plan was validly established by each of the respondents.

Statutes Involved.

The applicable statutes or portions of statutes involved are set forth in the Appendix, *infra*, pp. 19-21.

Statement.

The facts appearing in the record may be summarized thus:

Before the effective date (October 24, 1938) of the Fair Labor Standards Act of 1938, each of the respondents gave to each of the petitioners, then employed by it as redcap

porters at its passenger stations, as well as to all other redcap porters employed by it, a notice, identical in form with that considered by this Court in *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386, 392, establishing the identical accounting and guarantee plan there held valid (R. 575, 584, 594, 772, 784, 803, 813, 821). Each of the petitioners thereafter continued to work as a redcap for his respective employer-respondent, made a daily report of tips which he said he had received from passengers and, for each pay-period in which the tips so reported by him did not equal or exceed the minimum wage prescribed by Section 6 of the Fair Labor Standards Act, received payment for the deficiency from his employer-respondent (R. 576, 585, 595, 773, 785, 804, 814, 822).

Under the pleadings and the agreed statements of facts filed as to each of the respondents, it was open to each of the petitioners to prove, as he contended and the respondents denied, that in some instances he had reported that he had received more in tips from passengers than he had actually received. Of the 1091 petitioners, only 19 testified on the trial which, as before indicated, was by the court without a jury. None of the 19 introduced evidence as to any specific deficiency in any pay-period during the time covered by the action. The District Court said in its memorandum opinion:

> "On the trial only nineteen plaintiffs, employed by only four of the railroad companies, gave any testimony on the fact of reporting tips in a greater amount than were actually received, and this was not in actual dollars and cents. As to the remaining 1,072 employees there is no substantial evidence that they received less than the amounts which they reported. * * * I do not believe that plaintiffs have satisfactorily sustained the burden of proof on this question" (R. 749-750).

The District Court found as a fact from all the evidence, among other findings:

> "3. Each of the plaintiffs has failed to prove by a preponderance of the evidence that his respective employer-defendant failed to pay him the minimum wages prescribed by Section 6 of the Fair Labor Standards Act of 1938 * * * for any pay-period during the time covered by this action" (R. 755).

The District Court concluded as a matter of law, among others:

> "3. The claim of each of the plaintiffs against his respective employer-defendant for unpaid minimum wages, for liquidated damages, for attorney's fee, and for costs of the action is without merit and should be denied" (R. 756).

The District Court therefore entered judgment that the plaintiffs have and recover nothing.

The Circuit Court of Appeals, after considering the case on briefs and oral argument, unanimously affirmed the judgment of the District Court (141 F. 2d 483, 486; R. 836, 837).

SUMMARY OF ARGUMENT.

I.

The only question of law in this case that is based on the Fair Labor Standards Act of 1938 has already been decided against petitioners' contention, in *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386. All the respondents had in effect during the period covered by this action the identical accounting and guarantee plan which this Court held valid in the *Williams* case.

The trial court, sitting without a jury, found as a fact that not one of the 1091 petitioners (of whom only 19 had testified) had proved that his employer-respondent had failed to pay him the minimum wages prescribed by the Act for any pay-period. The Circuit Court of Appeals held that the evidence supported the finding, and affirmed the judgment against the petitioners. Under such circumstances this Court will not grant a further review.

II.

The decision of the Circuit Court of Appeals with respect to the Illinois anti-tipping statute was correct. The court below pointed out that, by its own terms, the statute purported to cover only tips in addition to any regular rate of charge, whereas the petitioners' tips were the sole compensation for redcap service while the accounting and guarantee plan was in effect. Moreover the only Illinois decision construing the statute held that under similar circumstances an employee could not recover from his employer tips which he had currently surrendered to him.

III.

The opinion of the court below has not decided any question arising out of the Railway Labor Act; consequently, there is nothing in its opinion for this Court to review in that respect. Petitioners did not argue this point on the oral argument before the Circuit Court of Appeals. They did not file a petition for rehearing in that court. Having failed to exhaust their remedies in the court below, they are not in a position to ask this Court to grant them the discretionary remedy of certiorari. Moreover, the record supports the trial court's finding that the accounting and guarantee plan was validly established by each of the respondents.

ARGUMENT.

I.

The fundamental question of law involved in this case is based on the Fair Labor Standards Act of 1938; but that question has already been decided adversely to the contention of the petitioners in *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386. This Court there held that a railroad company operating a passenger terminal might credit against the minimum wage prescribed by that Act tips received by redcaps from passengers, when there had been established by notice an accounting and guarantee plan which left all tips with the redcaps and assured them that each would receive at least the minimum wage.

In the case at bar each of the respondents, by a notice identical with that in the *Williams* case, duly established the identical accounting and guarantee plan which this Court in that case held to be valid. The only difference in this respect between the *Williams* case and this case is that here, by the pleadings and the agreed statements of facts that were received in evidence with respect to all petitioners and respondents, there was left open to the petitioners an opportunity to prove, as they contended and the respondents denied, that in the reports that they had filed each day throughout the period of the accounting and guarantee plan they had in some instances reported more tips than they had actually received. In short, the difference is not one of law but of fact.

Practically all the testimony and other evidence introduced by the petitioners before the District Court on the trial without a jury, with the exception of the agreed state-

ments of facts, was offered in the attempt to prove the alleged fact of over-reporting tips. Yet only 19 out of 1091 petitioners (less than 1¾% of the whole number, and employed by only four of the eight respondents) offered any such testimony, and none of the 19 testified in dollars and cents to a deficiency in the minimum wage during any specific pay-period (R. 749, 755). Moreover, by cross-examination and by evidence introduced by them, the respondents sharply contested the testimony of the 19 petitioners on this point. After a full hearing the trial judge found the facts against the petitioners. Specifically he found that each of the petitioners had failed to prove by a preponderance of the evidence that the respondent that employed him had failed to pay him the minimum wages prescribed by the Act for any pay-period during the time covered by the Act (R. 755). This Court has declared in the rules which it promulgated for civil procedure in the District Courts:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnessess" (Rule 52(a), Federal Rules of Civil Procedure).

On the record in this case, the Circuit Court of Appeals said:

> "Since the recent decision in *Williams* v. *Jacksonville Terminal Co.* (*Jacksonville* and *Dallas* cases), 315 U. S. 386, there is little left for discussion or decision in the instant case. There, it was definitely decided that the Accounting and Guarantee Plan, 'which leaves all tips with the redcaps and assures them that [they] each would receive at least the minimum wage,' was valid; in other words, tips received by a redcap must be accounted for to the extent necessary to make up his minimum wage. The principal difference between the instant case and the *Jacksonville* case is that here plaintiffs had an opportunity under the pleadings and

agreed statements of facts to prove, if they could, that their tip reports were inaccurate in the manner alleged, namely, that they had not received in tips as much as they had reported to their respective employer-defendants'' (141 F. 2d 483, 484).

After pointing out that the issue presented was one of fact and that, of the 1,091 petitioners, only 19 were called as witnesses, the Circuit Court held:

> ''Furthermore, even though the court had found that the 19 plaintiffs who testified had reported tips in amounts greater than received, as a result of coercion or for any other reason, such a finding could not support a judgment as to the remaining 1,072 plaintiffs. In addition, the testimony of the plaintiffs who testified was speculative and uncertain as to any amount which that particular plaintiff reported over the amount received. We agree with the lower court that the burden was upon each plaintiff to prove the amount reported in excess of that received before that plaintiff would be entitled to judgment. All of the plaintiffs having failed to offer proof in this respect, it follows that none of them were entitled to judgment'' (141 F. 2d 483, 485).

Petitioners unjustly criticize the comment of the Circuit Court of Appeals ''that it would be immaterial whether the reporting of tips in excess of the amount received was the result of coercion, mistake or otherwise'' (Brief, p. 23). This clause is quoted, out of context, from that portion of the Circuit Court's opinion that discussed the amount and kind of proof necessary to support petitioners' case. The immediate context of the Circuit Court's discussion is as follows:

> ''Under plaintiffs' stated theory of liability, this burden required plaintiffs to establish not only that excessive tips were reported, but the amount thereof, as well as the pay-period during which they were so reported. This is so, irrespective of the charge or proof concerning coercion, for the reason that it would

be immaterial whether the reporting of tips in excess of the amount received was the result of coercion, mistake or otherwise" (141 F. 2d 483, 485).

That is a correct statement of the law. Petitioners here sued under section 16(b) of the Fair Labor Standards Act for alleged liability for unpaid minimum wages, together with an additional equal amount as liquidated damages; but that section requires proof only of the fact of failure to pay the minimum wage, not the reason for non-payment. Thus the Circuit Court properly held that it was necessary for each petitioner to prove by a preponderance of competent evidence that, during one or more pay periods in the time covered by this action, he had not received from the respondent that employed him the minimum wages prescribed by section 6(a) of the Act, and the court also properly held that the reason for the alleged deficiency was immaterial.

The Circuit Court continued, after explaining that as to four respondents "there is not a scintilla of proof in support of the allegation that redcaps employed by these railroads reported tips in excess of those actually received":

> "As to the remaining defendants, the matter of coercion was a sharply controverted question which the trial court evidently resolved against the plaintiffs. Moreover, this question of coercion is rather incidental to the main issue. After all, the question for decision below was whether the plaintiffs or any of them proved that they had not received the minimum compensation provided by the Act. On this issue, the court found:
>
> > 'Each of the plaintiffs has failed to prove by a preponderance of the evidence that his respective employer-defendant failed to pay him the minimum wages prescribed by Section 6 of the Fair Labor Standards Act of 1938 * * * for any pay-period during the time covered by this action.'
>
> "The sole question here is whether that finding is substantially supported by the record" (141 F. 2d 483, 484).

The Circuit Court concluded that the evidence fully supported the finding.

From the foregoing examination of the opinion of the Circuit Court of Appeals, it is apparent that petitioners are seeking to induce this Court to review the evidence and to reconsider findings of fact made by the District Court after trial without a jury, and held by the Circuit Court to be substantially supported by the evidence. According to the established practice of this Court, however, a writ of certiorari will not be granted merely to review an issue of fact, where no question of law is involved. For instance, in *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178, this Court said:

> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. * * * Moreover, the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support. * * * There is evidence to support them."

The Court's practice concerning questions of fact in certiorari petitions is thus described in the words of a former Chief Justice:

> "Records are replete with testimony and evidence of facts. But the questions on certiorari are questions of law. So many cases turn on the facts, principles of law not being in controversy. * * * This at once disposes of a vast number of factual controveries where the parties have been fully heard in the courts below and have no right to burden the Supreme Court with the dispute which interests no one but themselves" (Hart, *The Business of the Supreme Court at the October Terms, 1937 and 1938* (1940), 53 Harv. L. Rev. 579, 595, note 28).

No unsettled issue of law under the Fair Labor Standards Act being involved in the instant case, and both courts below having resolved the factual issues in respondents'

favor, this Court will not grant a further review. *Page* v. *Arkansas Natural Gas Corp.*, 286 U. S. 269, 271; *Virginian Railway Company* v. *System Federation No. 40*, 300 U. S. 515, 542.

A subsidiary point urged by petitioners may be disposed of briefly. Although they brought this action as employees, petitioners now claim in this Court not only the right to receive in cash from their employer-respondents the full statutory minimum wage, but also the right to retain all tips on the theory that they are "volunteers" (Brief, pp. 26-27). They evolve this theory from two sentences quoted from the opinion of this Court in the *Williams* case, 315 U. S. 386, 398. The sentences are taken from that part of the opinion in which this Court reached the conclusion that, although the redcaps continuously protested the authority of the railroads to take over the tips, yet because they remained at work subject to the requirement of the accounting and guarantee notice, their protests were unavailing against the employers. This Court said:

> "Although the new plan was not satisfactory to the redcaps, the notice transferred to the railroads' credit so much of the tips as it affected. By continuing to work, a new contract was created" (315 U. S. 386, 398).

Of course, petitioners cannot be both volunteers and employees. A similar argument was rejected by the Circuit Court of Appeals for the Fourth Circuit in *Southern Ry. Co.* v. *Black*, 127 F. 2d 280, 283:

> "Plaintiffs cannot blow hot and cold. They cannot say that the service for which tips are received is employment within the meaning of the act and in the same breath deny that the tips, which by agreement are the only compensation for the service, are wages of that employment. Nor can they assert the control of defendants over the relationship for the purpose

of bringing themselves under the act and deny that control in so far as it relates to the tips, which they receive because of the relationship."

II.

Notwithstanding what petitioners say in their brief (pp. 29-32) concerning the importance of the decision of the Circuit Court of Appeals with respect to the so-called Illinois anti-tipping statute, it is evident that the Circuit Court has not "decided an important question of local law in a way probably in conflict with applicable local decisions" (Supreme Court Rule 38, par. 5(b)).

On the contrary, as appears from the opinion itself, the only Illinois decision brought to the attention of the court, *Gloyd* v. *Hotel La Salle Co.*, 221 Ill. App. 104, held under similar circumstances that an employee could not, by reason of anything contained in the Illinois statute, recover from his employer tips which he had currently surrendered to him (141 F. 2d 483, 485).

Petitioners in their brief (pp. 29-31) attempt to distinguish the *Gloyd* case from the case at bar with respect to the Illinois court's holding that the plaintiff could not recover because he was *in pari delicto* with the defendant; but the attempted distinction is without a legal difference. The Illinois court held that it would not enforce the return of the tips, and that is precisely the situation in this case, so far as the Illinois statute is concerned.

Furthermore, the Circuit Court of Appeals clearly demonstrated in its opinion that the statute relied on had, by its own terms, no application to the redcap tips because they were not, at the time the accounting and guarantee system was in effect, "tips, in addition to the regular, ordinary and published rate of charge for work performed, materials furnished or services rendered," in the words of the Illinois statute. The Circuit Court of Appeals said:

"Such tips were not, therefore, in addition to any

> published rate of charge, but were the sole compensation received by plaintiffs unless such tips failed to equal the minimum wage requirements, in which case defendants were required to pay such deficiency" (141 F. 2d 483, 485).

Petitioners also indicate that the Circuit Court of Appeals decided an important question concerning the relationship between state and federal law, that is, between the Illinois anti-tipping statute and the Fair Labor Standards Act. But with respect to this point the Circuit Court of Appeals held:

> "Defendants further contend that the Illinois provision is not controlling because it conflicts with the Fair Labor Standards Act as construed by the Supreme Court in the *Williams* case. In view of what we have said, we think it is unnecessary to consider or decide this contention" (141 F. 2d 483, 486).

The Circuit Court, therefore, had no occasion to consider the relation between these two statutes, because it held that, irrespective of the provisions of the Fair Labor Standards Act, the Illinois statute was not applicable to the petitioners' case since, as pointed out above in the quotation from the Court's opinion, the tips here involved were not "in addition to the regular, ordinary and published rate of charge for work performed" and were consequently not within the provisions of the state statute. If petitioners had demonstrated their right to recover by virtue of the state statute, considered without reference to the Fair Labor Standards Act, the Circuit Court would have gone on to consider the relationship and possible conflict between the state and federal statutes. The language of the Illinois statute itself, however, and the sole Illinois decision construing the statute, left no doubt, in the opinion of the Circuit Court, that the state statute lent no support to petitioners' case.

This Court is not called upon to grant certiorari merely for the purpose of reviewing the Circuit Court's obviously

correct appraisal of the Illinois anti-tipping statute and the Illinois decision construing it. The point, moreover, does not affect any of the petitioners except such as were employed in Illinois by only three of the eight respondents (Brief, p. 34).

III.

Petitioners complain because the Circuit Court of Appeals "failed even to discuss the effect of the existence of negotiated agreements respecting wages" (Brief, p. 32).

Since there is nothing whatever in the opinion of the Circuit Court of Appeals dealing in any way with the Railway Labor Act, that court has not "decided" any question concerning that Act. Consequently, it cannot be contended that the Circuit Court "has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court" (Supreme Court Rule 38, par. 5(b)).

The fact that the petitioners did not see fit to argue this point on the oral argument before the Circuit Court of Appeals is sufficient explanation of the fact that the point is not discussed in the opinion. Moreover, if petitioners believed that the Circuit Court of Appeals should have discussed the point under the Railway Labor Act now argued in this Court, their remedy was by a petition to the Circuit Court for a rehearing, so that the court below would have been afforded an opportunity, if it deemed it necessary, to discuss the point. By not exhausting their remedies in the Circuit Court of Appeals, petitioners have foreclosed themselves from the discretionary remedy of certiorari in this Court.

While it is true that the point with respect to the Railway Labor Act was mentioned in petitioners' brief in the Circuit Court of Appeals, it was answered fully in the respond-

ents' brief in that court. Petitioners did not see fit to file a reply brief or, as has been indicated before, to argue the point orally. However, on March 10, 1944, approximately two months after the oral argument on other phases of the case, petitioners filed with the Circuit Court their "Additional Suggestions," directing its attention to the recent decisions of this Court in *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, and *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332.* On March 14, 1944, respondents filed an answer to the additional suggestions pointing out that the decisions had no application to the facts pertaining to the institution and operation of the accounting and guarantee plan by the two respondents against whom the allegation of violation of the Railway Labor Act is directed. Neither respondent attempted to avoid collective bargaining or sought to supersede or expand a collective bargaining agreement. Neither respondent did anything inconsistent with the agreements which they had entered into with some of their redcap employees (R. 788-792; 813, 814), but only adopted a plan of payment which assured each employee a wage not less than the minimum under the Fair Labor Standards Act. That plan took absolutely nothing away from the redcaps. It gave them something additional (R. 814).

The record itself in this case justifies the failure of the Circuit Court to discuss the point in its opinion. As to one of the two respondents, petitioners even failed to include the charge with reference to the Railway Labor Act in the statement of points relied upon (R. 760). As to both respondents, petitioners failed to show that any violation of the Railway Labor Act took place. The trial court found that the "accounting and guarantee plan was validly established and put into effect by each of the eight defend-

* On page 33 of their brief in this Court petitioners have said that these decisions were specifically called to the attention of the Circuit Court of Appeals. On March 16, 1944, the Circuit Court filed its opinion (R. 831).

ants herein on October 24, 1938, with respect to each of the plaintiffs * * *'' (R. 755). That finding is well supported by the record.

Conclusion.

The decision of the Circuit Court of Appeals was correct. There is no conflict with the decision of another Circuit Court of Appeals on the same matter. The Circuit Court of Appeals has not decided an important question of local law in a way probably in conflict with applicable local decisions. The question of federal law decided by the Circuit Court of Appeals with respect to the Fair Labor Standards Act had already been settled by this Court in *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386. The Circuit Court of Appeals has not decided a federal question in a way probably in conflict with applicable decisions of this Court.

In short, there are no special and important reasons for reviewing the record of the court below. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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APPENDIX.

STATUTES INVOLVED.

1. *Fair Labor Standards Act of 1938* (June 25, 1938, c. 676, secs. 3, 6, 16, 52 Stat. 1060, 1062, 1069; U. S. Code, title 29, secs. 203, 206, 216) provides in part:

SEC. 3. As used in this Act— • • •

(e) "Employee" includes any individual employed by an employer. • • •

(g) "Employ" includes to suffer or permit to work. • • •

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour. • • •

SEC. 16. (b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

2. *Railway Labor Act* (May 20, 1926, c. 347, 44 Stat. 577, 582; as amended June 21, 1934, c. 691, 48 Stat. 1186, 1197; U. S. Code, title 45, secs. 152, 156) provides in part:

> SEC. 2. • • •
>
> Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act. • • •
>
> SEC. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

3. *Illinois anti-tipping statute* (June 29, 1915, Laws 1915, p. 385; Illinois Revised Statutes, 1943, c. 38, Criminal Code, pars. 551-553) is here set out in full:

> AN ACT prohibiting the leasing or using of any space or portion of places of public accommodation or public resort for the purpose of accepting, demanding or receiving gratuities or donations, commonly called tips, from the public. (Approved June 29, 1915. L. 1915. p. 385.)

SEC. 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That it shall be unlawful for the owner, proprietor, lessee, superintendent, manager or agent of any hotel, restaurant, eating house, barber shop, theatre, store building, office building, factory, railroad, street railroad, fair ground, baseball or football ground, hall used for public meetings or entertainments, or any other building, office, or space which is a place of public accommodation or public resort, to rent, lease, or permit to be used any part, space or portion thereof, for any trade, calling or occupation, or for the exercise of any privilege, by any person, company, partnership or corporation, for the purpose of accepting, demanding or receiving, directly or indirectly, from the customers, patrons or people who frequent such places of public accommodation or public resort, gratuities or donations, commonly called tips, in addition to the regular, ordinary and published rate of charge for work performed, materials furnished or services rendered, provided, that nothing in this section contained shall be construed to prohibit any employee or servant from accepting or receiving gratuities or donations, commonly called tips, if such gratuities or donations, commonly called tips, are not accounted for, paid over, or delivered, directly or indirectly, in whole or in part, to any person, company, partnership or corporation, but are retained by such employee or servant, as and for his absolute and individual property.

SEC. 2. Any lease, contract, agreement or understanding entered into in violation of the provisions of section 1 of this act shall be absolutely void.

SEC. 3. Any person, company, partnership or corporation, or any officer or agent thereof, violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding ten thousand dollars for each and every offense, and, in addition thereto such person, officer or agent may, in the discretion of the court, be sentenced to the county jail not less than three months and not more than one year.